

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE
THE DELAWARE ENERGY OFFICE
THE OFFICE OF MANAGEMENT AND BUDGET
AND THE CONTROLLER GENERAL**

IN THE MATTER OF THE INTEGRATED)
RESOURCE PLANNING FOR THE PROVISION)
OF STANDARD OFFER SERVICE BY DP&L)
POWER & LIGHT COMPANY UNDER)
26 DEL. C. §1007(c) & (d): REVIEW AND) PSC DOCKET NO. 06-241
APPROVAL OF THE REQUEST FOR)
PROPOSALS FOR THE CONSTRUCTION OF)
NEW GENERATION RESOURCES UNDER)
26 DEL. C. §1007(d) (Opened July 25, 2006).)

**CONECTIV ENERGY SUPPLY, INC.'S
PETITION FOR REHEARING AND RECONSIDERATION**

Pursuant to Rule 34(b) of the Rules of Practice and Procedure of the Delaware Public Service Commission (the "Commission"), Conectiv Energy Supply, Inc. ("hereafter "CESI"), by and through the undersigned counsel, hereby requests reconsideration and rehearing of the Final Findings, Opinion and Order No. 7199 issued on May 22, 2007 (the "May 22 Order"), by the Commission, the Delaware Energy Office ("the Energy Office"), the Office of Management and Budget ("OMB"), and the Controller General (referred to collectively as the "State Agencies"), and in support thereof avers as follows:

PRELIMINARY STATEMENT

CESI brings this petition for reconsideration urging the State Agencies to fulfill their legislative mandate. The Delaware General Assembly set forth a construct by which these Agencies were directed to bring financial relief to Delmarva Power & Light ("DP&L") ratepayers who were facing rate increases in excess of 60% following expiration of a rate freeze in June, 2006. No one disputes that the primary purpose behind EURSCA was rate relief.

Indeed, this Commission has repeatedly recognized the importance of price in the RFP and IRP processes created by the legislature in EURSCA. However, notwithstanding the directive of the General Assembly, and the rules and procedures established, after months of deliberation, by the Commission and the Energy Office, the State Agencies drastically departed from EURSCA's mandate to select the power generation proposal that results in the greatest long-term system benefits in the most cost-effective manner. Instead, the State Agencies adopted the Staff's recommended hybrid approach, which had never been presented by any bidder, had never been subject to public scrutiny and was completely inconsistent with the fundamental purpose of the underlying legislation. The State Agencies' decision to direct DP&L to negotiate with Bluewater Wind for power from a wind farm as a primary source, and to negotiate simultaneously with CESI and NRG for gas fueled back-up power is fundamentally flawed. Most importantly, it turns the enacting legislation on its head by adding hundreds of millions of dollars to the rates paid by DP&L SOS customers.

Consistent with the purpose of the EURSCA legislation, CESI urges the State Agencies to approve the Hay Road Proposal which, by their own approved evaluation criteria, provides the greatest long-term system benefits in the most cost-effective manner. In compliance with the Administrative Procedures Act, and the procedures developed by the Commission and the Energy Office, CESI demands that the State Agencies play by the rules. The May 22 Order's fundamental departure from the rigorous process created by the Commission and the Energy Office should not be permitted to stand.

In the first instance, CESI asks that, if the State Agencies direct any bidder to negotiate with DP&L for a power purchase agreement ("PPA"), they should adhere to the scoring results sanctioned by the Commission and the Energy Office and direct DP&L to negotiate a PPA solely

with CESI as proposed in its Hay Road Proposal. If the State Agencies reject this request and reaffirm their determination to require DP&L to negotiate for a hybrid approach, CESI requests that the State Agencies take full advantage of competition by: (i) permitting CESI to negotiate with DP&L so that its Hay Road Proposal competes for the gas-fired back-up generation component to the hybrid, and (ii) allowing both CESI and NRG to submit a proposal to compete with Bluewater Wind for the wind generation component.

I. REQUEST FOR EXPEDITED CONSIDERATION.

1. CESI respectfully requests that the instant request be heard on an expedited basis and be placed on the Commission's June 19, 2007 Hearing Docket. CESI has filed this application in such a manner as to allow other interested constituents seven days to respond, in advance of the June 19 hearing, as required by the Commission's Rules of Practice and Procedure. As negotiations continue under the May 22 Order, and the Order provides only 30-60 days for such negotiations, CESI respectfully suggests that time is of the essence and the instant application should be heard at the June 19, 2007 Commission hearing. If this motion is not placed on the docket for the June 19 Commission hearing, then CESI urges the State Agencies to stay negotiations under the May 22 Order, pending consideration of this application.

II. CESI HAS STANDING TO FILE THIS PETITION.

2. Rule 34(b) of the Rules of Practice and Procedure of the Commission allows "any party" to "petition for rehearing and reconsideration." Rule 2 defines a "party" as "a person who, as a matter of right or by Commission authorization, appears in and has a direct interest in a proceeding before the Commission."

3. During the proceedings under this docket, the Commission has permitted participants in this proceeding, including bidders such as BWW, to seek reconsideration of Commission orders. *See, e.g.,* March 23, 2007 Docket Entry (Bluewater Wind's Motion for

Reconsideration). Consequently, the Commission has established a precedent consistent with CESI's filing of this petition. Over the past several months, CESI appeared and participated in these proceedings as a bidder for the construction of new generation resources. The Commission's May 22 Order directed DP&L to negotiate with bidders. As a result of CESI's appearance before this Commission, presentation of its bid, and cooperation in the bid procedures, CESI has a direct interest in the Commission's Order. Accordingly, CESI is a "party" for purposes of these proceedings.¹

III. THE LEGISLATIVE AND COMMISSION MANDATES

A. EURSCA

4. In March 2006, the General Assembly enacted the Electric Utility Retail Customer Supply Act of 2006, 26 *Del. C.* §1001, *et seq.* (the "EURCSA") in response to "the resulting consumer outrage occasioned by the announcement of the imminent rate increases [ranging from 59% to 112%] as a result of the expiration of a three-year rate freeze." *See* May 22 Order at 2.

5. The underlying purpose of the legislation was to address the rate increases that occurred after termination of the rate freeze by directing DP&L: (i) to pursue integrated resource planning ("IRP") to provide Delaware consumers with sufficient and reliable resources over the long-term at minimal cost; and (ii) to solicit bids pursuant to a Request for Proposals ("RFP") for the construction of new generation in Delaware by August 1, 2006 via long-term contracts, under the direction and oversight of the State Agencies. 26 *Del. C.* §1007(c),(d).

¹ Because CESI is subject to the Commission's May 22 Order, due process requires that CESI maintain the right to file this petition. Due process concerns remain paramount in administrative proceedings. *See New Castle Development Co., L.L.C., v. New Castle County Board of Adjustment*, 1996 Del. Super. LEXIS 528, at *12 (observing that "the Board must still adhere to fundamental due process" despite the relaxation of the technical rules of evidence).

6. EURSCA empowered the State Agencies as follows:

a. The Commission and the Energy Office are authorized to “approve or modify the elements of [DP&L’s] RFP prior to its issuance” and to ensure that the RFP “elicits and recognizes the value of proposals that: (i) utilize new or innovative baseload technologies; (ii) provide long-term environmental benefits to the state; (iii) have existing fuel and transmission infrastructure; (iv) promote fuel diversity; (v) support or improve reliability; and (vi) utilize existing brownfield or industrial sites.” 26 Del. C. §1007(d)(1).

b. The State Agencies are required to “retain the services of an independent third-party entity with expertise in the area of energy procurement at the expense of DP&L to oversee the development of the request for proposals and to assist them in their review of proposals pursuant to 26 Del. C. §1007(d)(3). . . .” 26 Del. C. §1007(d)(2).

c. The State Agencies are required to “evaluate the [responses to the RFP] and may determine to approve one or more of such proposals that result in the greatest long-term system benefits, including those identified in 26 Del. C. §1007(d)(1), *in the most cost-effective manner.*” 26 Del. C. §1007(d)(3) (emphasis added).

d. The State Agencies are authorized to approve the contract or contracts entered into by DP&L. *Id.*

7. In accordance with the requirements of 26 Del. C. §1007(d)(1), the Commission and the Energy Office opened this docket on August 8, 2006 to perform their review and oversight functions under EURSCA, including: (i) directing the Commission Staff to conduct an initial public workshop to receive public input to the RFP and to obtain additional information from DP&L; (ii) directing the Commission Staff, in conjunction with the State Agencies’ independent consultant (“IC”), to present a report and recommendation on the RFP

(the “Staff RFP Report”); (iii) permitting the public to submit written responses to the Staff RFP Report; (iv) directing the IC to submit a final report on the RFP (“IC Final RFP Report”); and (vi) permitting the public to submit oral comments in response to the IC Final RFP Report.

B. The October 31, 2006 Order

8. On October 31, 2006, the Commission and the Energy Office issued their Findings, Opinion and Order No. 7066 (the “October 31 Order”) and elaborated regarding the specific standards by which bid proposals under EURCSA would be evaluated. The Commission and the Energy Office recognized that the primary role of the bid process was to mitigate the type of rate increases that followed termination of the price freeze in June 2006. Indeed, the Commission and the Energy Office characterized the purpose of EURCSA and their own legislative mandate with respect to the RFP process as follows:

- a. to control rate increases (October 31 Order at ¶8),
- b. to approve proposals that result in the greatest long-term system benefits “in the most cost-effective manner” (*Id.* at ¶41); and
- c. to acquire resources to meet customer demand “at a minimal cost” (*Id.*).

9. The Commission and the Energy Office explicitly ruled that “price should be encompassed in the RFP process” and agreed with the IC, noting “that the General Assembly was interested in fostering price stability at a reasonable price. Price stability is important, but only if the level of the stable price is reasonable (that is, it is cost-effective). The proposals that are likely to be successful are those that achieve the greatest long-term system benefits as enumerated in the EURSCA in the most cost-effective manner.” *Id.* ¶43.

10. To this end, the Commission and the Energy Office adopted a bid evaluation methodology comprised of price and non-price criteria with a 60/40 respective weighting. *Id.* ¶111.

11. The IC recommended, and the Commission and the Energy Office adopted, three “supercategories” in which the winning project must score well (*Id.* ¶112-113, 115):

a. Providing Delaware residential and smaller commercial customers with the opportunity to stabilize their rates at attractive or acceptable levels and terms and conditions (“Economics”);

b. Supporting generation projects that will benefit or mitigate impacts to the state overall and diversification for DP&L’s SOS customers (environmental impacts, fuel diversity, technological innovation) (“Favorable Characteristics”);

c. Contracting for a new project that has a high likelihood of being built, thereby providing economic and environmental benefits (financing plan, site development, operation date certainty, reliability, bidder experience) (“Project Viability”). *Id.* ¶112.

12. The Commission and the Energy Office then devoted substantial attention to the price evaluation methodology underlying the “Economics” supercategory. October 31 Order, pages 53-75.

13. The Commission and the Energy Office stated that “[i]n most cases [in the industry], lowest price is the primary selection criteria with risk factors included in the final evaluation in some processes.” *Id.* at ¶122.

14. The Commission and Energy Office ultimately agreed with the IC and other parties that “price is appropriately a factor in the evaluation of the bids; indeed, we believe

it *must* be a factor. Given the situation that led to the genesis of the EURCSA (high SOS rates), we do not believe that the General Assembly would have intended the State Agencies to consider a new generation source in Delaware that would assure stable prices at the expense of those prices being extremely high.... [I]n order to discharge our duties under the EURCSA, we must consider price as a factor.” *Id.* at ¶ 165 (emphasis in original).

15. In Order No. 7106 dated December 19, 2006 (the “December 19 Order”), the Commission and the Energy Office had occasion to revisit the importance of price in the bid evaluation process and to respond to criticisms that they had allocated too much weight to price. December 19 Order ¶9.

16. In reiterating the significance of price factors in the evaluation of bids, the Commission and the Energy Office stated:

[A]s we discussed in Order No. 7066, we are well aware of the genesis of the EURCSA, which was the extremely high rate increases to customers that resulted when price caps were removed and market-based prices went into effect as a result of the Restructuring Act of 1999. In fact, EURCSA specifically declares that ‘it is the policy of the State that electric distribution companies’ regulated by the Commission must conduct IRP ‘for the purpose of evaluating and diversifying their electric supply options, efficiently *and at the lowest cost to their customers.*’

See December 19 Order at ¶ 9 (citing 26 *Del. C.* §1002(4)) (emphasis in original).

17. The Commission and the Energy Office further noted that:

a. “EURSCA *explicitly* instructs that the RFP process be ‘part of the initial IRP process’ (see 26 *Del. C.* §1007(d)); making it evident that *cost was a critical component of the RFP process.*” *Id.* at ¶ 9 (emphasis added);

b. “the EURCSA instructs the State Agencies to select the *most cost-efficient* projects that meet the EURCSA criteria” (*Id.*) (emphasis added);

c. under EURSCA the RFPs must meet the proposed selection criteria based on the cost-effectiveness of the project in producing energy price stability. *Id.*

18. The Commission and the Energy Office further observed that:

Price stability is important, but only if the level of the stable price is reasonable (that is, it is cost-effective) and that the proposals that were likely to be successful were those that achieve the greatest long-term system benefits as enumerated in the EURSCA in the most cost-effective manner. (Order No. 7066 at ¶43). Therefore, ***price was contemplated as an essential criterion, and we further believe that price was the driving force in the enactment of the EURCSA.*** In light of this, we believe that the assignment of 33 points to the price criterion is justified, and do not believe it necessary to reconsider our decision on this issue.

December 19 Order at ¶ 9 (emphasis added).

IV. THE BID AND EVALUATION PROCESS

A. The Bid Proposals

19. On December 21 and 22, 2006, CESI, Bluewater Wind (“BWW”), and NRG Energy, Inc. (“NRG”) submitted bid proposals.

20. CESI proposed construction of a 180 MW combined cycle gas turbine (“CCGT”) plant at its existing Hay Road plant location (the “Hay Road Proposal”). The Hay Road Proposal involved construction on a brownfield site and proposed the use of existing electric transmission and natural gas infrastructure. The Hay Road Proposal also included an innovative fuel acquisition strategy under which CESI sold gas-fired generation to DP&L at a competitive price but did not expose customers to the volatility of the short-term natural gas market. Because it did not include a “must take” provision, the Hay Road Proposal also permitted DP&L to take advantage of lower cost power and/or demand side management opportunities that might arise during the term of the PPA.

21. NRG proposed to sell DP&L 400 MW of power from a 600 MW coal-fired integrated gasification combined cycle ("IGCC") facility to be constructed at its Indian River site.

22. BWB submitted twelve variations of a 400 MW or 600 MW off shore wind farm.

B. The CESI Bid Receives the Highest Ranking from DP&L and the IC

23. On February 21, 2007, the IC and DP&L Consultants issued Evaluation Reports reflecting their assessments of the three bids that had been presented. Both Evaluation Reports applied the selection criteria approved by the Commission and the Energy Office. Both Evaluation Reports concluded that CESI's Hay Road Proposal was the lowest priced and the highest ranked of the three proposals.

C. Staff Review

24. On May 2, 2007, the Commission Staff issued its Review and Recommendations on Generation Bid Proposals ("Staff Report").

25. Staff readily acknowledged the IC conclusion that the CESI proposal ranked the highest in all categories:

Supercategory	CESI Score
Favorable Characteristics	10.8 out of 20 possible points
Project Viability	18.5 out of a possible 20
Economics	5.5 out of a maximum 6

Staff Report, pp. 29-31.

26. Staff endorsed the supercategory analysis of the bid proposals and agreed that CESI ranked highest under this analysis, followed by BWB and NRG. *Id.* at 54-55.

27. In contrast, while BWW scored well in favorable characteristics (18.2/20), it scored only 9.9/20 in project viability and averaged only 0.6/6.0 in economics. *Id.* at 27-29.

28. Likewise, NRG scored well in favorable characteristics (averaging 11.9/20), but averaged 11.5/20 in project viability, and 0.8/6.0 in economics. *Id.* at 31-33.

29. In reviewing the bid proposals' potential impact on market price, Staff noted that the CESI bid was the low bid.

30. As set forth in the IC Case Price Scoring, CESI was closest to market, and only nominally over-market.

Summary	Market	CESI	BWW (mean)	NRG (mean)
SOS Cost	\$86.20	\$87.48	\$98.15	\$101.60
Points Scored		33.0	6.9	0.5

See IC Report, at 37.

31. Indeed, as shown above, CESI's Hay Road Proposal was only \$1.28/MWh above the SOS base case values – the projected cost of SOS service under continuing reliance upon the competitive wholesale market. BWW's proposal was more than \$12.00/MWh over the SOS base case values and NRG's proposal was more than \$15.00/MWh above the SOS base case values.² Staff Report, at 34.

32. The IC further noted that CESI scored best under an SOS cost profile analysis (during the 2012-2015 period), such that in the first full years of the project being in

² The IC projected that the CESI, BWW and NRG proposals would add \$1/month, \$12/month and \$15/month to ratepayers bills, respectively. DP&L projected that a more realistic expectation was that the proposals would increase ratepayer bills in a range of \$22/month to \$55/month. May 22 Order, ¶25.

service, CESI's SOS costs were \$67/MWh, while NRG and BWW averaged \$83-\$86/MWh and \$77-\$80/MWh, respectively.

33. Thus, under every price analysis CESI's Hay Road Proposal is the most economic.

D. Staff Recommendation

34. Notwithstanding the Hay Road Proposal's position as the lowest cost and highest ranked proposal under scoring criteria applied by the IC and DP&L (and as acknowledged by Staff), the Staff declined to recommend that the State Agencies direct DP&L to negotiate with CESI for the completion of a PPA under the Hay Road Proposal. Instead, the Staff recommended that the State Agencies direct DP&L to enter into negotiations with BWW for a 200-300 MW PPA from an offshore wind farm and with CESI for a 150-200 MW PPA for a CCGT with synchronous condenser capabilities to be located in Sussex County at an undetermined site. *See* Staff Report at 64.

35. In total contravention of the December 19, 2006 Order in which the Commission and Energy Office emphasized that price was "contemplated as an *essential criterion*" and that "price was the *driving force* in the enactment of the EURCSA," the Staff Report virtually ignored price as a factor. Staff merely stated that "[a]lthough Staff's recommendation is not the least expensive solution, it is a complementary energy arrangement that will help to mitigate global warming and reduce dependence on fossil fuels. Taken together, their projects, when appropriately managed, should have a positive impact on price stability." Staff Report at pp. 64-65.

36. Staff's recommended rejection of the Hay Road Proposal as the source of back-up power under its hybrid proposal was ostensibly based on two items: (1) the

PowerWorld, Inc.'s Report's conclusion that injection of power at Hay Road would have "minimal impact" on voltage and reactive support in the southern part of the state "because it is located too far north to truly help for reliability purposes;" and (2) oral and undocumented discussions between certain Staff members and PJM employees. *Id.* at 58. The Staff's reliance on the PowerWorld Report and its conversations with PJM (and in fact the very existence of the PowerWorld Report and the PJM conversations) were not disclosed until just days before the Commission adopted the Staff Recommendation by voice vote.

V. THE COMMISSION HEARING AND ORDER

37. At the Commission's regularly scheduled meeting on May 8, 2007, the Commission decided by voice vote to accept the Staff Recommendations with certain modifications.³ On May 22, 2007, all members of the Commission and the representatives of the State Agencies, the latter who had abstained from voting at the May 8, 2007 hearing, approved the Findings, Opinion and Order No. 7199 (the "May 22 Order") affirming the May 8, 2007 voice vote.

38. The May 22 Order acknowledged that the Hay Road Proposal was the highest ranking bid according to the previously enumerated selection criteria. *See* May 22 Order at ¶ 13. Further, the Order affirmed once again that while all three bids were above the SOS base case values, CESI's bid "was only \$1.28/Mwh above market projection, while Bluewater's and NRG's bids were \$12.01 and \$15.17 MWh higher than market forecast, respectively." *Id.*

39. The May 22 Order further acknowledged the central role that the PowerWorld Report and Staff's oral discussions with PJM played in the determination:

³ One of the most critical exceptions was the unilateral decision to direct NRG to compete with CESI for the back-up gas-fired generation, although NRG had not proposed a gas-fired generator at any time during the bidding process.

In April 2007, Delaware Public Service Commission Staff (the “Staff”) solicited both PJM and PowerWorld, Inc. to analyze four generation contingency scenarios and assess how each would affect overall PJM reliability. On April 27, 2007, PowerWorld filed its report, in which it concluded that although the retirement of Indian River Units 1 and 2 did not create insurmountable reliability issues in Delaware, each scenario introduced new contingency violations that would have to be addressed operationally regardless of which generation option was in place. PJM reported similar results in its oral discussions with Staff.

Id. at ¶ 16. It is clear from a comparison of the May 22 Order to the PowerWorld Report that the Order essentially mirrors the findings and recommendations in the Report.

40. Despite the Commission’s and the Energy Office’s prior explicit and emphatic recognition that price was an essential criterion of EURSCA, in the May 22 Order the State Agencies dramatically changed direction. They found that “the criteria enumerated in the EURCSA...do not focus solely on price; rather, *there are other public policy considerations that the General Assembly has identified as more important than price.*” *Id.* at ¶ 53 (emphasis added). Accordingly, the State Agencies ignored the results of the evaluation conducted pursuant to the scoring criteria and summarily dismissed the Hay Road Proposal, stating simply that the Hay Road Proposal “does not utilize a new or innovative technology and it is not nearly as environmentally friendly as other proposed projects.” *Id.* at ¶ 54.⁴

41. In its May 22 Order, the State Agencies did not simply reject the Hay Road Proposal as the primary source of power to meet SOS customer load. They also rejected the Hay Road Proposal as a possible source of back-up gas-fired power, instead directing CESI

⁴ As discussed below, there is insufficient evidence in the record to reject the Hay Road proposal on the basis of reliability.

to compete with NRG for a gas-fired plant to be located in Sussex County even though NRG had not offered a gas-fired plant and CESI had not proposed a southern location.⁵

ARGUMENT

I. STANDARD OF REVIEW

A. The State Agencies' Actions as Set Forth in the May 22 Order Are Subject to the Administrative Procedures Act.

42. EURSCA on its face directs that “[j]udicial review of such final orders and regulations [of the Commission] shall remain available under §10141 and §10142 of Title 29.” 26 *Del. C.* §1015. Section 10161(a)(3) of title 29 of the Delaware Code specifically identifies the Public Service Commission as one of the agencies subject to the Administrative Procedures Act. 29 *Del. C.* §10161. While the proceedings under this docket leading up to the issuance of the May 22 Order involved the State Agencies’ oversight of the DP&L competitive bidding process, the May 22 Order substantially affects the rights of all bidders: it prohibits CESI from negotiating a back-up contract under the Hay Road Proposal; it invites NRG to compete with CESI for a gas-fired back-up proposal in Sussex County (which was not part of either of NRG’s or CESI’s initial bids); and it prohibits any competitive bidding for wind power. With the issuance of the May 22 Order, the State Agencies raised these proceedings to the next level of judicial review, entitling interested constituents to party status, and therefore, due process.

B. The Commission’s Decision Must be Based Upon Substantial Evidence.

43. The Commission’s findings are subject to a “substantial evidence” standard. *See* 26 *Del. C.* § 1015(a); 29 *Del. C.* § 10142(d); *Delmarva Power & Light Co. v. Public Serv. Comm’n*, 508 A.2d 849, 850 (Del. 1986). “Substantial evidence” has been defined

⁵ Indeed, the State Agencies appear to be pre-disposed to a Sussex County location even though they have directed CESI and NRG to negotiate. The May 22 Order specifically states that the NRG bid “may compare favorably due to NRG’s pre-existing location in Sussex County....” May 22 Order, ¶56.

as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is also defined as more than a scintilla but less than a preponderance of evidence.”

DiFilippo v. Beck, 567 F. Supp. 110 (D.Del. 1983); *Tulou v. Raytheon Serv. Co.*, 659 A.2d 796 (Del. Super. Ct. Mar. 5, 1995); *Wilmington Suburban Water Corp. v. Public Serv. Comm’n*, 1986 Del. LEXIS 1270, at *5 (Del. Oct. 6, 1986).

44. Although the Commission may apply its institutional knowledge and expertise to the evaluation of conflicting evidence, it may not create evidence. *United Water Del., Inc. v. Public Serv. Comm’n*, 723 A.2d 1172, 1176 (Del. 1999). The “substantial evidence” required must exist on the record before the agency. *Id.* at 1173.

45. The Commission’s findings must be based on “competent evidence, not supposition.” *Id.* at 1176. “Pertinent information known personally by [Board] members, but not placed into the record by proper evidence, cannot be considered by a court on appellate review.” *New Castle Development Co. v. New Castle Board of Adjustment*, 1996 Del. Super. LEXIS 528, at *7 (Del. Super. 1996). In *New Castle Development Co.*, the Court noted that the Board of Adjustment erroneously considered unsworn testimony and “relied upon representations and not proper evidence,” and observed that “one Board member was influenced by a private site visit.” *Id.* at *10-12. *Ex parte* consultations concerning “any issue of fact or law” by members or employees of state agencies are impermissible. 29 Del. C. § 10129. Indeed, the Commission’s own rules provide that “[n]o Commissioner or Commission Staff assigned to participate in any way in the rendering of a case decision shall discuss or communicate, directly or indirectly, respecting any issue of fact or law with any party or person except upon notice to, and opportunity for, all parties to participate.” Rule 12 (Commission Rules of Practice & Procedure).

46. Additionally, due process considerations require that any testimony that may be considered in reaching an administrative decision should be sworn and subject to cross-examination. *Blue Cross & Blue Shield of Del., Inc. v. Elliott*, 479 A.2d 843, 851 (Del. Super. Ct. 1984). “The right to confrontation is fundamental to a fair trial under both the federal and state constitutions....” *Redden v. Meadow Wood Hosp. for Children and Adolescents*, 1997 Del. Super. LEXIS 66, at *8 (Del. Super. 1997). Although administrative agencies “need not conform to common law or statutory rules of evidence or other technical rules of procedure...the guarantee of due process trumps all else. While the Board may relax certain rules of procedure, the Delaware Supreme Court has stated that even at the administrative level, ‘it is fundamental that the right to confront witnesses, to cross-examine them, to refute them, and to have a record of their testimony must be accorded unless waived.’” *Caldwell Staffing Services v. Ramrattan*, 2003 Del. Super. LEXIS 23, at 5-6 (Del. Super. 2003).

C. **The Commission May Not Commit Errors of Law**

47. Judicial decisions interpreting the Administrative Procedures Act, to which these proceedings are subject, have confirmed that errors of law on the part of an administrative body are a valid basis of appeal. *See Bracy v. City of Wilmington*, 2002 Del. Super. LEXIS 510 (Del. Sup. Ct. Dec. 18, 2002) (noting that the Commission’s decision should be upheld as long as there are no legal errors and substantial evidence supports its factual findings); *Chesapeake Utilities Corp.*, *supra*, at 1065.

48. “[I]f an agency departs from prior precedent or regulatory practice involving the same utility it must provide a rational explanation for the departure.” *United Water*, *supra*, at 1177; *see also Chesapeake Utilities Corp. v. Delaware Pub. Serv. Comm’n*, 705 A.2d 1059, 1074 (Del. Super. Ct. Mar. 31, 1997). Such a departure must be supported by the evidentiary record. *United Water*, *supra*, at 1177.

II. THE MAY 22 ORDER IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND CONTAINS LEGAL ERRORS.

A. The State Agencies Erred in Departing from the Bid Criteria Established Under EURSCA

49. The May 22 Order fundamentally diverges from the October 31, 2006 and December 19, 2006 Orders in which the Commission and Energy Office emphasized the important of price in the bid selection criteria. The May 22 Order fails to refer to any competent evidence in the record to support this radical departure from, and contravention of, the principles set forth above.

50. In addition to impermissibly changing the selection criteria without basis or explanation, the May 22 Order is further legally flawed in that it does not follow the objective prescription set forth in EURCSA and the prior Orders for the evaluation of bid proposals. Specifically, the May 22 Order essentially ignores price as the controlling factor of EURCSA, and declines to adopt the carefully constructed and rigorous approach to the evaluation as statutorily required. This is a fundamental error of law that warrants reconsideration.

51. As stated in the October 31 Order, the General Assembly passed EURSCA in response to the 60% rate increases seen by SOS customers in June 2006. If the General Assembly intended to respond to those rate increases by passing legislation that further increased prices to ratepayers in the name of more environmentally friendly generation that mandate would be reflected in the statute. It is not. Instead, the General Assembly delegated to the State Agencies the responsibility for evaluating the various proposals and selecting one or more that provide the “greatest long-term system benefits” in the “most cost-effective manner.”

52. Specifically, the General Assembly directed the Commission and the Energy Office to review and approve DP&L's RFP.⁶ The legislature directed the State Agencies to retain an independent third-party entity to oversee the development of the procurement and to assist the State Agencies with their evaluation of the proposals.⁷ Finally, it directed the State Agencies to evaluate the proposals and to approve one or more that result in the greatest long-term system benefits in the most cost-effective manner.⁸ At each of these steps in the process, CESI's Hay Road Proposal was selected as both the lowest cost and highest ranked of the three proposals.

53. In undertaking their duties under EURSCA to approve the terms of the RFP, the Commission and the Energy Office sought repeated reports from the Staff and the IC; they considered both oral and written comments from interested parties; and they approved the RFP and scoring criteria that was ultimately issued in the 98 page October 31 Order. The RFP, as approved, was a well reasoned method of balancing all critical elements required for evaluation of the proposals. In other words, as required by 26 *Del. C.* §1007(d)(1), the Commission and the Energy Office approved an RFP that "elicit[ed] and recognize[d] the value of" the six factors set out by the General Assembly.

54. Three proposals were submitted in response to the RFP. As required by 26 *Del. C.* §1007(d)(3) the State Agencies, with the assistance of the IC, evaluated those proposals. That evaluation revealed that CESI's Hay Road Proposal was both the lowest cost and the highest ranked.

⁶ 26 *Del. C.* §1007(d)(1).

⁷ 26 *Del. C.* §1007(d)(2).

⁸ 26 *Del. C.* §1007(d)(3).

55. In the May 22 Order, however, the State Agencies ignored both the approved RFP scoring criteria and the evaluation that applied that scoring criteria to the proposals. The State Agencies rejected the Hay Road Proposal, the highest ranked proposal under the evaluation, saying nothing more than “it does not utilize a new or innovative technology and it is not nearly as environmentally friendly as other proposed projects.” It is easy for the State Agencies to capitulate to public opinion and to conclude that wind generation is more environmentally friendly than generation from fossil fuels. However, the General Assembly did not direct the State Agencies to select automatically the most environmentally friendly proposal. The legislature directed the State Agencies to conduct a well reasoned evaluation of all factors that results in the greatest long-term system benefits in the most cost-effective manner.

56. The October 31 Order mandated the process by which bids would be evaluated under the approved scoring criteria. Moreover, 26 *Del. C.* §1007(d)(3) requires that the State Agencies’ selection be based upon an evaluation of the various proposals taking into consideration numerous factors. The State Agencies could not reject the results of the approved evaluation procedure without evidence that they based their selection on some alternative evaluation procedure. There is, however, no competent evidence referenced within the May 22 Order that indicates that the State Agencies did anything other than to arbitrarily choose to ignore the results of their own evaluation procedure and the bid rankings of the Commission’s IC and DP&L’s consultants.

57. By rejecting the Hay Road Proposal and directing DP&L to enter into PPAs with BWW and a gas-fired generator in the southern part of the state, the State Agencies are subjecting ratepayers to rate increases that will exceed those that they would have seen under

continued reliance upon the competitive market which triggered passage of EURSCA in the first place.⁹ However, without the evaluation required by 26 Del. C. §1007(d)(3) it is impossible to determine whether the increases over and above those that ratepayers would have seen through continued reliance upon the competitive market will be 10%, 50%, or even more. In addition, without the required evaluation, it is impossible to determine what ratepayers are likely to receive in exchange for these rate increases in the way of reduction in pollutants or improved reliability.

58. In light of the foregoing, if the State Agencies are going to direct DP&L to negotiate with any of the bidders, they should direct DP&L to suspend negotiations with BWB and NRG and to commence negotiations solely with CESI for a PPA under the Hay Road Proposal.

B. The State Agencies Erred in Not Taking Full Advantage of Competitive Opportunities.

59. If the State Agencies determine to adhere to the Staff's recommended hybrid approach (notwithstanding the arguments advanced above), they should do so only upon an evidentiary record founded in the principles of EURSCA; that is, one that facilitates competition to ensure the most cost-effective long-term solution.¹⁰

***It is in the Ratepayers' Best Interests for
the State Agencies to Encourage Competition
and to Embrace Flexibility in the Bidding Process***

60. The May 22 Order repeatedly manifests the importance of competition throughout the RFP process as mandated under EURSCA.

⁹ The IC estimated the impact to be in the hundreds of millions of dollars over the life of the PPA.

¹⁰ CESI reserves all rights with respect to the evidentiary deficiencies and errors of law set forth herein.

a. The Order acknowledges that the use of the “big funnel approach [was] designed to encourage as many potential bidders to submit proposals.” May 22 Order, ¶9;

b. The Order directed DP&L to negotiate simultaneously with BWB (for wind) and with CCSI and NRG (for back-up generation) based upon the State Agencies’ belief that such a procedure would “result in the bidders putting their best bids forward, rather than trying to hedge their bets to see what comes out of the negotiations between DP&L and BWB.” *Id.* ¶57;

c. Finally, the May 22 Order stated the State Agencies’ agreement “with the bidders’ observations that flexibility and competition are crucial components to the upcoming negotiations.” *Id.* ¶60.

61. There is no reason to abandon the principles of competition and the concomitant benefits for ratepayers for either wind or backup generation if the State Agencies affirm their decision to endorse a hybrid approach.

62. The May 22 Order directs DP&L: (1) to negotiate a PPA with BWB for wind generation, and (2) to negotiate competitively for a PPA with CCSI and NRG for back-up gas generation.

63. In light of the inherent benefits engendered by competition as recognized in the May 22 Order, it appears unlikely that the State Agencies intended for BWB to be insulated from competition. The May 22 Order manifests the State Agencies’ desire to see ratepayers reap the benefits of competition between NRG and CCSI for the gas-fired back-up plant. Presumably, the same benefit would be gained by ratepayers if CCSI and/or NRG were to now add a wind component to their proposals and to compete against BWB.

64. In addition to acknowledging the importance of competition in the RFP process under EURSCA, the May 22 Order also recognizes the benefits of preserving the flexibility of the entire process.

a. The May 22 Order noted that the Commission and the Energy Office endorsed the revised RFP issued by DP&L because it “provided more flexibility in the RFP requirements to encourage a greater number of bid submissions.” May 22 Order, ¶10;

b. The Order recited the Staff’s belief that there were numerous options available to the State Agencies; *id.* ¶19;

c. In addressing DP&L’s concerns, the Order maintained that there was no prohibition within EURSCA which would limit the State Agencies’ consideration of bids to only those projects submitted by the bidders. Instead, the State Agencies found that “EURSCA contains no such limitation in its language, and indeed the RFP that the Commission and the Energy Office approved contemplated that negotiations could occur between DP&L and a bidder that would change the proposal from what was initially submitted.” *Id.* ¶50 (explaining that was the entire point of rejecting non-negotiable terms);

d. The Order acknowledged that the State Agencies would “allow some, albeit not unlimited, flexibility in the size [of a wind power contract] because we want to give DP&L and Bluewater the greatest flexibility in negotiating an agreement that will be the most beneficial for Delaware. But that flexibility must also be coupled with a recognition that the proposed contract must be sized appropriately for the estimated SOS demand.” *Id.* ¶55.

e. The State Agencies further stated that “if a bidder seeks to change its project to make it more price-stable, reliable or otherwise acceptable under the EURSCA standards, we do not see why it should not be permitted to do so.” May 22 Order, ¶50;

f. Finally, as set forth above, the May 22 Order stated the State Agencies' agreement "with the bidders' observations that flexibility and competition are crucial components to the upcoming negotiations." *Id.* ¶60.

65. The State Agencies, therefore, erred: (1) by rejecting the Hay Road Proposal as a competitive option for the back-up gas generation component of the hybrid approach, and (2) by failing to permit either CESI or NRG to submit a wind generation proposal to compete with BWB.¹¹

C. Rejecting the Hay Road Proposal as a Potential Source of Back-up Power Eliminated the Most Advantageous Option for Back-up Power Without Any Competent Evidentiary Support.

66. The May 22 Order rejecting the Hay Road Proposal, both as the primary source of power and as the back-up component of the hybrid, was apparently based upon oral, off-the-record discussions between unnamed persons and upon a report that was neither sponsored by a sworn witness nor subjected to scrutiny by the participants. Such "evidence" should not be used as the basis for rejecting the Hay Road Proposal.

67. The flaws in use of the undocumented oral discussion with anonymous PJM employees are simply too numerous to list. *See* Staff Report, at 58 (stating that "PJM reported [results similar to the PowerWorld report] "in Staff's discussions with it"). None of the interested constituencies – including the public and the bidders – were provided the opportunity to question the PJM discussions. The affected parties do not know the context of the discussions between Staff and the anonymous PJM employee; they do not know, and they have not been

¹¹ During its negotiations directed by the May 22 Order, CESI has tried to interject the possibilities of use of (1) the Hay Road Proposal as an option for the gas back-up component, and (2) a wind proposal in competition with BWB. However, DP&L has refused to entertain such discussions stating that the negotiations are limited by the May 22 Order.

given the opportunity to test, the basis for any conclusions that may have been conveyed by the employee to Staff; they do not know, and they have not been given the opportunity to test, whether the PJM employee was qualified to give the conclusions being relied upon by the Staff; and the list goes on. There is simply no way that oral discussions of some unknown nature between Staff and an unnamed PJM employee can be used as the evidentiary basis for rejection of the Hay Road Proposal.

68. The PowerWorld Report is equally deficient “evidence.” Staff Report, 57-58. The PowerWorld Report was made public only days before the State Agencies met to vote on the Staff’s recommendations. *Id.*, n. 27. The PowerWorld Report is a highly technical report discussing issues of power transmission and reliability that is only understood by experts in the field. However, unlike every other evaluation or report submitted in this Docket, the public was not given the opportunity to ask further questions of the author of the report, to submit oral or written comments on the report or to present rebuttal on the same issues. Without such testing it is unclear whether PowerWorld’s conclusions regarding the impact of the Hay Road Proposal on reliability are accurate or whether there might be a solution to the reliability issue which uses the Hay Road Proposal, rather than back-up generation in the southern part of the state.

69. In light of the rate increases that led to EURSCA and the time and effort spent by the parties and the State Agencies in this matter, CESI submits that the State Agencies should not summarily dismiss the lowest cost and highest ranked proposal under their own scoring criteria without proper evidentiary justification. The rejection of the Hay Road Proposal as a potential source of back-up power based on the conclusions in the PowerWorld Report (a document not made public until just days before the State Agencies adopted their recommendation) and upon an undocumented discussion between unnamed Staff members and

unnamed PJM employees is not the type of evidence that can be used to support summary rejection of the highest ranked proposal from further consideration as a source of supply.

70. If the State Agencies reject CESI's request to enforce the Hay Road Proposal as the highest scoring bid and reaffirm their determination that DP&L should adopt a hybrid approach, then CESI requests that the State Agencies permit DP&L to negotiate with CESI for a PPA with CESI for power from Hay Road as one of the competitive alternatives being considered for the back-up component of the hybrid. Neither DP&L nor the State Agencies should be permitted to reject the Hay Road Proposal as a qualified source of back-up power without evidentiary proof that it fails to adequately contribute to system reliability.

D. Permitting CESI and NRG to Modify Their Proposals for the Components of the Hybrid is Consistent with the Mandate of EURSCA and Prior Orders in this Docket.

71. There does not appear to be any formal prohibition against any bidder modifying its proposal to conform to the State Agencies' preferred hybrid approach at this date (if such hybrid approach should stand). Indeed, the State Agencies appear to be encouraging NRG to introduce a gas-fired generation component into its proposal even though gas-fired technology was never in its original proposal or even suggested as a possibility until the State Agencies met for a voice vote on their final order. If either NRG or CESI were to modify its proposal at this time to include a wind generation component, they should be perceived as simply making their proposal more acceptable under the EURSCA standards as permitted by the above quoted language of the State Agencies.

72. There may be some concern that introduction of a wind component by CESI or NRG at this time might cause delay in the process. However, the 30 to 60 day window currently imposed by the May 22 Order for completion of contracts is not mandated by law.

73. The last RFP-related deadline defined in EURSCA was the February 27, 2007 deadline for the State Agencies' evaluation of bid proposals. 26 *Del. C.* §1007(d)(3). That deadline has already been met. Thereafter, the statute directs the State Agencies to "determine to approve one of more of such proposals that result in the greatest long-term system benefits . . . in the most cost-effective manner." *Id.* Consequently, there is no statutory prohibition against extending this process in order to discharge the underlying purpose of EURSCA – rate relief.

74. While CESI does not concede that modification of the CESI or NRG proposal to include a wind component would delay the negotiations, by even 30, 60 or 90 days, such a delay would be a small cost for the benefit to be gained by competition. The State Agencies explicitly recognized that the negotiating process could be extended if continuing progress were demonstrated. May 22 Order, ¶56. There is no justification for arbitrarily rushing the process to meet artificial deadlines, particularly where the purpose of the process is to bring new generation to Delaware that will be in service for 25-30 years, and where the only ancillary effect would be to restrict competition that will ultimately benefit Delaware consumers.

CONCLUSION

75. Based upon the forgoing, CESI respectfully urges the State Agencies as follows:

a. If they decide that DP&L should be required to negotiate with any of the bidders for a PPA, they should direct DP&L to terminate negotiations currently underway and to commence negotiations solely with CESI for a PPA under the Hay Road Proposal which was the highest scored under the previously conducted evaluation;

b. If the relief under the previous paragraph is not granted, they should take full advantage of competition under the hybrid approach by: (1) directing DP&L to

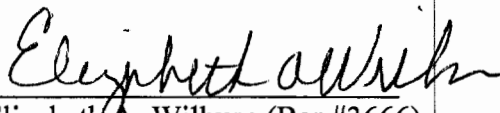
negotiate with CESI under the Hay Road Proposal as a option for the gas-fired back-up component and approve any resulting contract between CESI and DP&L unless it is determined, based upon competent evidence, that generation from Hay Road does not adequately enhance reliability; and (2) ruling that both CESI and NRG are free to modify their proposals to include a wind component and to include such component in negotiations with DP&L as a competitive option to BWV.

Respectfully Submitted,

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